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ALEXANDER L. STEVAS,
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NO. 80-1714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

CHARLES A. GRADDICK
Alabama Attorney General

EDWARD E. CARNES
Assistant Alabama Attorney General

Counsel of Record

SUSAN BETH FARMER
Assistant Alabama Attorney General

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for Petitioners

JOHN L. CARROLL

Counsel of Record

DENNIS N. BALSKE

1001 South Hull Street
Montgomery, Al. 36104
(205) 264-0286

STEVEN A. REISS
Suite 500
2555 M. Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 13, 1981
CERTIORARI GRANTED JUNE 22, 1981

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EVANS v. BRITTON

COURT OF APPEALS DOCKET ENTRIES [Excerpts]

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Title omitted in printing)

(Information combined chronologically from different subheadings and subheadings omitted)

Date	*Description*
	* * *
8/2/79	Record on Appeal and Exhibits
10/11/79	Brief for Appellant
	* * *
12/20/79	Brief for Appellee
1/17/80	Reply Brief for Appellant
	* * *
3/5/80	Flg. Ltr. of pro se appellant with statement attached. (Clerk's Endorsement)
3/28/80	Supp. Authority (Appellee) (CA)
4/1/80	Case argued
7/1/80	Flg. appelles' motion to certify questions of Alabama law to the Alabama Supreme Court (Submitted 7/2/80 RSV)
7/22/80	Supp. Brief for Appellant (Sent to Judges)
7/23/80	Supp. Brief for Appellee (Sent to Judges)
9/10/80	Flg. Ltr. of appellee dtd. 9/8/80 with attachment in support of motion to certify questions of Alabama law to Ala. Supreme Court. Submitted 9/10/80 RSV

10/15/80 Opinion Rendered/RSV Reversed/P.C./Thomas Dis.

10/23/80 Rehearing Mot. for Ext. (Appellee)/Ext. to: 11/19/80 (Per REW)

11/19/80 Petition for Rehearing (M) (Sent to Judges)/Appellees/En Banc

1/29/81 Flg. Ltr. of Appellees, dtd. 1/27/81, calling to Ct.'s attn. decisions w/reference to pet. for rehearing. (Sent to Judges)

3/9/81 Order Denying Rehearing (P) p. 4393/Thomas Dissenting

3/12/81 Stay of Mandate Motion (Submitted 3/13/81 RSV)/Granted RSV (3/20/81 to 4/8/81)

3/12/81 Flg. appellees' mot for clarification of en banc petition status.

3/20/81 Flg. Order DENYING appellees' motion for clarification of en banc petition status. (RSV)

4/1/81 Further Stay of mandate motion/Submitted 4/2/81 (RSV)/Granted RSV/(4/3/81 to 4/15/81)

4/20/81 Notice of Flg. of Cert. Pet. on 4/13/81

6/25/81 Order of S.C. Granted 6/22/81

EVANS v. BRITTON

DISTRICT COURT DOCKET ENTRIES [Excerpts]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

(Title omitted in printing)

Date	*Proceedings*
4/12/79	Petition, with verification, filed; referred to Judge Hand, lps.
4/13/79	Amendments to petition for a writ of habeas corpus by a person in State custody and for stay of execution filed by petitioner; referred to Judge Hand, lps
4/13/79	ORDER entered setting this case for hearing on Thursday, May 17, 1979 at 2:30 p.m. on its merits. . . .
	* * *
4/19/79	Motion for order compelling petitioner to present all constitutional claims and issues or waive them, with exhibit and brief attached, filed by respondent, lps
4/20/79	* * *
	ORDER entered that counsel for petitioner shall have 5 days in which to amend its petition to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this situation; the request for stay of execution is GRANTED and the execution set for April 27, 1979 is STAYED, effective at 5:00 P. M., Thursday, April 26, 1979,

provided this action is not withdrawn by the petitioner prior to that time (Min. Entry No. 48967), lps

4/23/79 Copies of Min. Entry No. 48967 mailed to attorneys, lps

* * *

4/25/79 Response of petitioner filed, ob

4/25/79 Amended Petition adding additional sub-paragraphs filed, ob

* * *

5/14/79 AMENDED petition filed, lps

ANSWER to amended petition filed by respondent (exhibits to this ANSWER are in a red file folder so marked), lps

* * *

5/17/79 HEARING held, arguments of counsel made, one witness examined. . . .

6/12/79 MEMORANDUM OPINION entered, after Court trial, finding that the Alabama Death Statute as related to the instant case is not unconstitutional (Min. Entry No. 49311), lps

JUDGMENT entered, in accordance with Memorandum Opinion of this date, that the petition for writ of habeas corpus is DENIED, costs taxed against the petitioner; further ORDERED that the stay of execution entered on April 20, 1979 effective since April 26, 1979 is DISSOLVED (Min. Entry No. 49312), lps

* * *

7/02/79 NOTICE OF APPEAL filed by Petitioner, John Louis Evans, III,

* * *

7/05/79 Certificate of Probable Cause to Authorize Apeal entered by Judge W. B. Hand, mpc

7/13/79 Certificate of Merit entered, (Minute Entry No. 49, 607). Copy mailed to Attorneys and to B. J. Mahoney, Court Reporter. mpc

* * *

7/31/79 Court Reporter's transcript of Hearing on Merits of Petition for Writ of Habeas Corpus filed by Betty Jane Mahoney, Official Court Reporter. mpc

STATE v. EVANS

EVANS' STATEMENT TO THE F.B.I.
CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(State's Ex. 16 in the state trial court — Habeas Answer Ex. A, 182-183, 252, 275-276.)

Little Rock, Arkansas
March 8, 1977

I, JOHN LOUIS EVANS, III, furnish the following free and voluntary signed statement to BILL P. HARDIN and JACK E. JUEL, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I understand this statement can be used in court.

At Mobile, Alabama, on January 5, 1977, WAYNE EUGENE RITTER and I entered a pawn shop with the intent to rob that pawn shop of a pistol. When we entered the pawn shop I had a .38 caliber German made revolver hidden in my waistline. WAYNE EUGENE RITTER asked the store owner to show him a .38 caliber Colt revolver. When the store owner took that revolver from a display shelf and handed it to WAYNE EUGENE RITTER, I drew my pistol at which time the store owner immediately ducked behind the counter and attempted to reach a gun in a nearby office. I leaned immediately across the counter and fired one shot which I know to have struck the man in the back. WAYNE EUGENE RITTER and I immediately ran from the store taking with us the .38 caliber Colt revolver. In the store at the time of the shooting were two young girls approximately six or seven years old. When we left the pawn shop we stayed in the Mobile area for approximately two-and-one-half hours.

I have read the above statement consisting of this and one other typewritten page. I have initialed each page and any correction. The statement is true to the best of my knowledge.

/s/John Evans

Witnesses: Jack E. Juel, Special Agent, FBI, Little Rock 3/8/77 (in handwriting)
Bill P. Hardin, Special Agent, FBI, Little Rock, Ark. 3/8/77 (in handwriting)

(Initials "J.E." omitted from each paragraph in printing.)

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

EVANS' STATE GRAND JURY TESTIMONY
[Excerpts]

(State's Ex. 27 in the state trial court — Habeas Answer Ex. A, 232-233, 318-337)

(Bracketed page references are to Habeas Answer Ex. A pages)

(Title omitted in printing.)

* * *

[321]

Q: Have a seat right here, John. All right. This is going to be sort of difficult for you to do so, but do the best you can. Would you raise your right hand? Do you solemnly swear the testimony you're about to give to this Grand Jury to be the truth, the whole truth, and nothing but the truth, so help you God?

A: Yes, I do.

Q: State your full name, please, sir.

A: John Louis Evans, III.

Q: How old are you, John?

A: Twenty-seven.

Q: And where were you born?

A: Beaumont, Texas.

* * *

Q: O.K. Uh, how did you meet Wayne Eugene Ritter?

A: Uh, we were both serving time in the Indiana Youth Center, Indiana's correctional institution.

* * *

[322]

Q: All right. Uh, had you and Ritter discussed, uh, what your plans might be while you were serving time in that institution?

A: Well, more or less. Uh, yeah, we decided we were going to get together and see what happened. You know, uh, decided that, uh, course I always knew that I'd go back

to armed robbery. You know, so, uh, he was game to try it so I was going to wait around till he got out.

Q: O.K. When you met and, uh, on Dec—was it December first or around that period of time?

A: Right.

Q: Did you have a conversation concerning what your plans may be at that time?

A: Oh, yeah, we discussed it for two or three weeks.

Q: Uh, could you summarize briefly what you had planned to do and h-- and your . . .

A: Well, you know, not really, I was going to rent a car and we were just going to take off. You know, go on a spree and, uh,

Q: You say a spree, what kind?

A: Armed robbery.

Q: Armed robbery spree.

A: And, uh, course, uh, Wayne was with his ex-wife then and wasn't quite sure and of course then they kinda fell out so he decided O.K. and we left, I think, on Christmas Day.

Q: All right. And did you—either one of you have guns at that time?

[323] A: Uh, yeah, when we left Indianapolis.

* * *

Q: Uh, approximately how many places did you go into prior to arriving in Mobile?

A: Uh, you mean as far as robbery goes? Three.

Q: And where were they located?

A: Uh, one in Dayton, Ohio; one in Montgomery, Alabama; and one in Biloxi, Mississippi.

Q: And were they—what type uh, institutions?

A: One of them was a Pizza Inn, another one was a Pizza Hut and another one was a motel.

Q: When you, uh, you didn't come straight to Mobile, Alabama, did you?

A: No, we didn't.

Q: Where did you go?

A: Well, we went down to Biloxi and we were down there for a few days.

Q: All right. Did you have companions in Biloxi?

A: Uh, yeah, we met a couple of girls there. Of course, they didn't know what was going on, I want that on the record, too.
Q: They didn't know that y'all were out pulling armed robberies?
A: No, no idea.
Q: You had, up until that time, you hadn't harmed anyone with a weapon of any sort?
A: No.
[324] Q: Uh, when you—what prompted you to come to Mobile, Alabama?
A: For robbery. Money.
Q: For money?
A: Yes.
Q: All right. And you came to Mobile on what date, do you recall?
A: January the fifth, 1977.
Q: Approximately what time did you get here?
A: Uh, about 2:30-3:00.

* * *

Q: All right. When you arrived in Mobile around 2:30 that afternoon, what were your plans, discussion, and how did you end up at Nassar's Pawn Shop?
A: Well, we were just going to wait till dark, you know, and find a place to rob. And the reason we were going to wait till dark is, you know, so that the car would not be so easily seen. And one of us was going to go in and one wait with the car. And we were riding around and talking about, you know, we could use another pistol instead of that clumsy rifle so and we passed by his pawn shop, you know, and saw it, so I said, "Well, let's go in and get one." You know, 'cause it was a little place. So I drove around the block and then we parked, you know, down the street, behind it and went in, you know, the pawn shop. And . . .
Q: Both of you go in at the same time?
A: Oh, yeah.
Q: How many people were in the pawn shop when you went in?
A: There were two girls, uh, watching TV in the corner,

uh, I don't, you know, I know now their ages, but I didn't at the time.

Q: All right. At that time, would you have considered them to be young girls?

[325] A: Oh, yeah, you know, bet--at the time, I figured between 6 and 10 years old.

Q: O.K. You later determined that they were 6 and 9, I think (inaudible).

A: Seven and nine.

Q: Seven and nine?

A: Right.

Q: Uh, was the owner there or some proprietor there or someone?

A: Yes.

Q: Was that the man that was shot?

A: Yes, it is.

Q: All right. Where was he located when you entered the store?

A: Uh, behind the counter and by--by the door and, uh, then when we came in, we walked to the counter in the back and Ritter asked to see a .38 Colt Cobra. And, uh, then Nassar reached in, and got it and handed it to Ritter and I started to pull my pistol to tell him it was a robbery and he dropped behind the counter and started for his office.

Q: Who did?

A: Nassar.

Q: Was he on his hands and knees?

A: Yes, he was.

Q: His back was to you?

A: Yes.

Q: You didn't notice a weapon at that time, did you?

A: Uh uh. No, he turned into the office and started to reach with his hand and then that's when I shot.

Q: Where did you shoot him?

A: In the back.

Q: And where was Ritter located in relation to you?

A: He was still back there by that counter.

Q: I see. You at no time saw a weapon?

A: No.

Q: It's my understanding that you made the statement before that you shot him because it was either a matter of him or you, is that correct?
A: Well, you know, my deduction at the time was he was going for a pistol and, uh, I wasn't going to stand there and let him shoot me with it so I fired.
Q: O.K. You--when you left there, were you convinced that the man probably was dead?
A: Oh, yeah.

* * *

[326] Q: You drove away?
A: Yes, I did.
Q: Where did you go then?
A: Uh, well, we kinda zigzagged around some streets and then we went to a shopping center and we were going to, you know, we decided, you know, well, hell, we couldn't try to get out of town then because people had seen the car. We were going to wail till dark and, uh, then we decided well, we might as well pull a robbery, you know, uh, when it gets dark 'cause we still needed the money. So, uh, then we, uh, had seen a Radio Shack and we decided we were going to wait till dark and go and hit it, you know, which we did. I parked the car on the side and then Ritter went in and held it up.
Q: About how much money did he get out of that?
A: About $300, I think.

* * *

Q: Getting back to, uh, Nassar's, uh, store and--and where he was shot, what do you recall, uh, Ritter, who spoke first to Nassar?
A: Uh, Ritter did.
Q: Did you ever say anything to him?
A: No.
Q: Uh, what did Ritter, what do you recall Ritter say--telling him or asking him?
A: He--we walked in and went back and we were talking about--Ritter and I were talking about the different guns back there and then he looked at Nassar and said, you know, 'Let me see that .38 Colt Cobra down there,' and . . .

Q: What? Did--did Nassar give him the gun?

[327] A: Right, he took the gun out and gave it to Ritter, you know, to look at.

Q: What did Ritter start doing with it?

A: Uh, well, Ritter had about six shells, I think, .38 shells, in his hand and, uh, the thing was as that he was going to start loading it as soon as I threw down on Nassar and I, of course, I guess he was still loading, you know, by the time I shot him.

Q: O.K. All right, you, uh, left the store, were the--were the little girls visible there when you shot Nassar in the back?

A: Well, they were in the left hand corner of the store and, of course, my back was, you know, to them so I didn't see if they moved or anything.

Q: O.K.

A: It was right I shot him when we left.

Q: All right. You left, you robbed a Radio Shack in Mobile . . .

A: Right.

Q: And what did you do then?

A: Got out of town. We went to, uh, Biloxi, Mississippi.

* * *

[328] Q: Where did you go then?

A: Jackson, Mississippi.

Q: And what did you do in Jackson?

A: Pulled an armed robbery.

Q: Where?

Q: Motel there. We were setting up an extortion type thing with a store, but the guy lived too far so we decided to hold it up and then on in to New Orleans and pull something there.

Q: Did you go in to New Orleans?

A: Oh, yeah.

Q: How many did you hit in New Orleans?

A: Uh, we held up two Pizza Huts and, uh, a chicken place and we pulled a kidnapping-extortion with a guy that ran an A & P Store, manager, and got $4,000, and of course, we left right after we did that.

Q: Uh, the Grand Jury might be interested to know how you did this extortion.

A: Well, we just found out the information, you know, on the manager and, uh, where he lived and everything and made a few phone calls and found out, you know, who he was and then, uh, one night we went to his house and knocked on his door and asked for somebody, you know, fictitious name and the lady got the phone book and she looked, 'Nobody here by that name, but I'll check for you.' And when she came back with the phone book we just pulled pistols and went on in. Then we taped up, you know, her and a friends of hers and, uh, the kids and Ritter went to the store with him. Made him empty the safe and, uh, of course, I was right behind him, which he didn't know. He thought I was still in the house with the family and, of course, nobody was hurt or anything, we just left them taped up. And, uh, then we got the money and we split--split up then.
Q: Where did you go after leaving New Orleans?
A: I went back to Biloxi and, uh, Ritter went up to Indianapolis and, uh, I think, that was on a Friday and Saturday we found out that we were wanted for murder.

* * *

[329] Q: After he got back, what did y'all do?
A: Well, we had about twenty-seven hundred dollars so, uh, we picked up the two girls that we were with earlier, and, uh, went to Florida. Orlando and, uh, you know, for Disney--took them to Disney World and everything and, uh, we were going to set up another kidnap-extortion there but, uh, we pulled a few armed robberies in the meantime.
Q: In the Orlando area?
A: Oh, yeah, yeah.
Q: Uh, after leaving Or--Orlando, where did you go?
A: To Tallahassee, Florida. We stayed there overnight and, uh,
Q: Rob a place there?
A: Robbed two places there.
Q: Two places. And then where did you go?
A: Pensacola.
Q: Did you hit anything in Pensacola?

A: Yeah. Robbed one place there and, uh, of course, like I said, we still had the girls with us, they didn't know what was going on and so . . .
Q: They didn't know you were pulling these robberies?
A: They didn't--had no idea whatsoever. They had no idea. And, uh, so we took up them home to Mississippi and, uh, took off with a car that I had this girl rent, you know, in her name, 'cause obviously I couldn't rent a car.
Q: Where did--where did you rent a car?
A: In Mississippi--Biloxi.
Q: I see. What was the girl's name?
A: Edie Fergonus. And, uh, then after we split from there, we went to Birmingham and pulled one robbery there and, uh, from there, we went to Charlotte, North Carolina, and pulled two armed robberies and a kidnap-extortion there. And, uh, from there we went to Chattanooga, Tennessee, and spent all the money and pulled two armed robberies there. Then we went to Nashville and pulled an armed robbery; then Memphis pull an armed robbery and then Little Rock we pulled two armed robberies and one attempted and set up another kidnap-extortion and the night we pulled the second armed robbery, uh, we got busted by the FBI.

* * *

[330] Q: It's my understanding from talking to you previously that you hadn't intended to be taken alive, is that right?
A: That's absolutely totally right.
Q: All right. Had you had your gun, it would have been a shoot-out and you had either escaped or you'd have been killed, it that correct?
A: Probably killed.
Q: Uh, so it was just a matter of, uh, surprise that you were apprehended without . . .
A: Right.
Q: There being a shoot-out of some sorts.
A: Right.

* * *

Q: Uh, no agent since the time you've been apprehended until this very moment has ever abused you in any way?

A: Oh, no, no, we've been treated very well, as a matter of fact.
Q: Threatened or coerced or promised or anything?
A: No.
Q: Uh, have you and Ritter discussed, uh, how this thing may come to an end or how you, uh,
A: You mean, now? Now that we're caught or?
Q: Prior to, uh, to being caught? Uh, did you ever . . .
A: Oh, oh, yeah.
Q: Did you ever think you'd be caught?
A: Oh, sure.
Q: And, uh, did you--when you, I'm sure you didn't plan to be caught, but you assumed that one day there was a chance of you being caught.
A: Oh, yeah. INAUDIBLE
Q: Upon that chance, had you made plans as to how you were going to try to get out of it or what would happen as a result of, uh, an encounter with law enforcement.
A: Uh, yeah. You know, we were going to make them take us--take us out of it and explain that we were going to get into a shoot-out, you know, because we had nothing to lose at that time, you know, uh, matter of fact, we figured we had nothing to lose from the time we left Indiana as parole violators. So, uh, of course, we've made the [331] statement that we wouldn't be taken and this is what we meant.
Q: O.K. Now, you were extradited back to, or waived extradition back . . .
A: Right.
Q: From Little Rock to Mobile, Alabama.
A: Right.
Q: You've been residing in the Mobile City Jail, have you not?
A: Right.
Q: You have given statements to the FBI, is that correct?
A: Right.
Q: And that was done after having been fully read your rights?
A: Right.
Q: Uh, no threats or coercion?

A: Right.
Q: The same being true with the statements given Mobile Police Department?
A: Right.
Q: And I guess the discussions you and I have had on various occasions, the same being true, is that right?
A: Right.
Q: You have been advised of your right by the Presiding Judge of the Circuit Court Joe Hocklander . . .
A: Right.
Q: At one time, prior to you making a television statement. Uh, no one has offered these things, you've requested it or asked for these things to be done?
A: Right.
Q: Uh, you have indicated to me, uh, on numerous occasions, I guess I could say, you wanted to die in the electric chair in the State of Alabama as soon as possible.
A: Right.
Q: Is that correct?
A: That's right.
Q: Uh, when you requested that I come over to the police station to discuss this with you, would it be a fair statement to say that I explained to you all the alternatives involved in the laws of the State?
A: Oh, yeah.
Q: Uh, did I tell you that, uh, you had a right to a trial by a jury?
A: Right.
Q: And, did I tell you that, uh, if a jury found you guilty it would be mandatory death but a judge could at the mitigating hearing, uh, commute it to life without parole?
A: Right.
[332] Q: Uh, do you still maintain, uh, that you wish to be indicted at the earliest possible moment and wish to be sentenced to death at the earl--earliest possible moment and electrocuted at the earliest possible moment?
A: Yes, I do.
Q: And, John, do you do all these things without any

promises or hopes of reward, leniency, or payments by anyone?

A: That's right.

Q: No one has threatened or coerced you to want to die, is that correct?

A: No.

Q: Uh, the only promise that anyone could make you under this set of circumstances, would be for you to go to Heaven and no one has that authority on this earth at that time.

A: That's right.

Q: You understand that? Uh, do you have any specific statements that you wish to ask or tell the Grand Jury before they might want to ask you some questions?

A: No, the only thing I ask is to be indicted and go through the whole thing as fast as possible.

Q: All right. Do any members of the Grand Jury? Yes, sir, and--and if you would, for the record, go ahead and state your name.

Q: Uh, my name is Tetea Crum, and I would like to ask him, why do you want a speedy trial?

A: Well, uh in the first place, I can't see staying in jail for, you know, for six months when--when you're going to get the same result anyway. Uh, I'm asking to be electrocuted in a, uh, a chair because I can't see spending the rest of my life locked up in a penitentiary, you know, I'm too young for that. So, uh, I feel like the best thing to do is to go ahead and get it over with as soon as possible.

* * *

[333] Q: Uh, you've been asked the question of how you view yourself. Uh, and I think you stated on occasions that you felt like you're . . .

A: Always been pretty rotten. Always been.

Q: Uh, if you had the opportunity, John, to be released, uh, what occupation would you pursue?

A: Honestly?

Q: Uh huh.

A: I'd go back to armed robbery.

* * *

Q: You've fully understood the consequences of you act when you shot Mr. Nassar?
A: Oh, yeah.
Q: Uh, you know the difference between right and wrong, John?
A: Sure. Sure, but, you know, society sets standards. Let me put it like that.

* * *

Q: And, uh, at the time that you shot Mr. Nassar in the back, you knew it was wrong, did you not?
[334] A: I didn't take time to think about it. Uh,
Q: After you shot him, did you know it was wrong?
A: I felt like it was wrong. Well, let me put it like this, I don't feel any remorse over it because I felt like anybody that would take a chance like that, especially with his two kids in there, you know, uh, there's got to be something wrong with the man. Uh, there's no way he could have beat me into that office ev--you know, if he had a pistol there or even if he didn't. There's, you know, it would have been utterly impossible.
Q: You were going to shoot him if he made that move?
A: I was going to shoot him if he reached for a--a firearm, yeah. Uh, of course, our intention always, you know, never to hurt anybody if you don't have to. That's--that's stupidity, you know. But if it ever came down to a case of, you know, of me or somebody else, well, that's--that's pure instinct. That's self preservation. I'm going to fire; I'm not going to waste any time and, uh, I felt like, uh, you know, of course, the man, if I would have--if--if it hadn't happened so quick, if I'd had have time, I would have told him, you know, don't do it, you know, but it just happened too quick. And I couldn't see him doing it with his kids there and I think that's the only--the only thing I have any remorse about or regret about. You know, was that the kids saw it. They were there and, uh, I couldn't understand it, too, because if I had been somebody really crazy, really far-out, you know, and didn't want any witnes, then I would have turned around and shot his kids, too, you know. But, uh, you know, uh, I just couldn't see him doing it, you know, I felt like, you know,

well, he took the chance *(inaudible)* first.And it's just that simple.

* * *

Q: Well, why didn't you give yourself up? You had that to do . . .
A: Well.
Q: Avoid all this, what you've been through?
A: No, because . . .
Q: 'Cause then you would have been off the street.
A: No, well, you know, uh, as a matter of fact, to be honest with you, I talked to an FBI agent twice before, uh, they caught us in my home town, uh, at my mother's suggestion. And we had talked about the possibility of me giving myself up. And, uh, course, when I found out, you know, I had nothing to lose anyway, well, why? Why give yourself up? Uh, . . .
Q: What do you mean you don't have anything to lose?
A: Well, uh, you know, I figured that I would get the electric chair anyway, you know, some place. And, uh, . .
Q: That's--that's what you're going after?
A: Well, uh, yeah, you may call it fatalistic.
Q: *(Inaudible--speaking while Mr. Evans speaking)* You wasn't going to be satisfied till you *(inaudible--Mr. Evans starts speaking).*
A: You--yeah, it may be fatalistic, you know, streak, I guess, you know, but, uh, uh, I knew the--the consequences and, uh, I knew all [335] the circumstances and I did it, uh, you know, with the same mind. I knew what I was doing. So, now--now's, you know, the old saying is, you know, you hear the tune, you've got to pay fiddle.
Q: Let me ask you this. You say, you would've gotten death here or somewhere else. Have you done something somewhere else that you would have *(inaudible--Mr. Evans starts speaking)*
A: Yeah, uh, I'm going to discuss that with Mr. Phillips, but, uh, it's something that didn't happen in all this, you know, uh, but I'm sure that it would constitute.
Q: You mean you've committed other crimes that somewhere else may have, uh, . . .

A: Which the police know nothing about as of this time.
Q: And you'd rather not talk about it yet?
A: Well, not to the Grand Jury. I might talk to the police about it.
Q: Bernard Smith. Was uh, Mr. Nassar the first man you ever killed?
A: No. Absolutely not.

* * *

Q: Well, have you ever thought of just going out and getting a job, a decent job?
A: Oh, I've done that, sure.
Q: And what made you just leave the job *(inaudible)* and go to, uh, to robbing people?
A: Well, uh, I don't know. Uh, It's kinda like an inner drive. I guess, you know, it's something that I always, uh, I've always done ever since, you know, I was a kid. And, uh, it's the easiest way I knew of to make money with, uh, usually the least amount of trouble, you know. Uh, like I said, you never want to hurt anybody and we always try to pick places to rob that we didn't think anybody would get hurt, you know.

* * *

Q: You say you'd only have to kill if you had to, in other words, if the situation presented itself, you would kill in an armed robbery as you did?

[336] A: If I had to do it again, yeah, without a doubt.
Q: Yes, sir.
Q: Charles, David Lucas. You said you was, uh, you talked to FBI agent twice?
A: Right.
Q: Before you was arrested? Is that since you killed Nassar?
A: Oh, yeah, oh, yeah.
Q: And he didn't try to arrest you?
A: Well, no, I didn't talk to his person, I talked to him over the phone. Uh, I was in Little Rock one time and Memphis the other time. And he was in Beaumont, Texas. Uh, he was a local agent there and, uh, of course, uh, matter of fact, he tried to get in touch with you and, uh,

you know, to see exactly what the deal was and he said, 'I won't lie to you.' He said, but I suggested getting together for a meet and he said, 'Well, I'm going to be honest with you, now, if I show up for a meeting, I'm go--you know, I'm not coming alone. You know, we're going to try and take you.' And he said, 'That's my job.' And I said, 'Well, I understand that, you know. I just want to know what the deal is.' Uh, I said, uh, 'If they still have the death penalty, then, you know, maybe I'll do it. If not, then forget it.' And he couldn't find out anything, couldn't guarantee me anything, you know, which I couldn't really expect him to. So we--I just decided, you know, well, I'll just wait until they find, you know, something does happen.

* * *

[337] Q: Do you have anything else you'd like to say?
A: No, that's it.
Q: Uh, you still--would you ask this Grand Jury to recommend to the Court that, uh, you be given priority and--and under the law and a trial date set as soon as--as allowable under the law so that, uh, you may either have your case tried or plead guilty?
A: Yes, I do.
Q: Do you intend to have your case tried or do you intend to plead guilty?
A: Plead guilty.
Q: Do you realize when you plead guilty you are pleading guilty to a--a death by electrocution?
A: Yes, I do.
Q: Do you intend to appeal it?
A: No, I do not.
Q: Any questions? Do you have anything else you want to say?
A: No.
Q: Again, for the record, you were not in any way threatened, coerced, promised, offered any hope of reward? You requested to have an opportunity to come here and speak to the Grand Jury?
A: Yes, I did.
Q: And you have nothing else at this time you want to, uh,

A: No, that's it.
Q: All right.
END OF TESTIMONY

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT ARRAIGNMENT PROCEEDINGS [Excerpts]

(Habeas Answer, Ex. A, 67-69)

(Bracketed page references are to Habeas Answer Ex. A pages.)

(Title omitted in printing.)

* * *

[67]

MR. COLEMAN: Judge, it is my understanding and Mr. Pennington's understanding that the Defendant is going to enter a plea of guilty to the indictment, in all three counts. I would like for the Record to state that Mr. Pennington and I have both advised the Defendant not to [68] enter a guilty plea, that he should enter a not guilty plea at least until such time as a determination has been made as to his competency. After having talked with him, it is still our understanding his desire to enter such a plea over our joint objection.

THE COURT: All right, Mr. Evans. First, what are your instructions to your attorney on whether to attack the validity of the Grand Jury that indicted you?

MR. EVANS: I'm going to waive that right, your Honor.

THE COURT: What is your response to the indictment?

MR. EVANS: It is true and correct on all counts.

THE COURT: Are you guilty or not guilty?

MR. EVANS: Guilty.

THE COURT: All right. The Court will set this for submission to a Jury at 9:30 next Tuesday, not tomorrow, but the 26th of April. Mr. Ritter was here earlier, and he indicated to me a desire to have both of you tried together. And that can only be done at your request. The law guarantees you the right to a separate trial.

MR. EVANS: We are both requesting that.

MR. COLEMAN: Judge, I would like for the Record to

show that he is doing that over my objection, too.

[69] MR. PENNINGTON: And over mine.

THE COURT: Now, your attorneys have filed a request for a mental examination, and I have spoken to Dr. Claude Brown and he will be visiting you sometime this week in jail. You do not have to talk with him if you do not want to, but if you talk with him, he will be at liberty to repeat anything you tell him.

MR. EVANS: All right.

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT MINUTE ENTRY CONCERNING ARRAIGNMENT

(Habeas Answer Ex. A., 6)

(Title omitted in printing.)

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorneys, John Coleman and Al Pennington, and the defendant in open court on this day being arraigned on the indictment in this case charging him with the offense of Capital Murder to which indictment defendant plead guilty.

And thereupon in open court on this day the defendant was served with a copy of the Indictment in this case.

And thereupon in open court on this day, the defendant and with his attorneys, and it is ordered and adjudged by the court that the trial of this case is hereby set for April 26th, 1977.

And it is further ordered and adjudged by the court that the defendant be and he is hereby allowed until the 22nd day of April, 1977, at 12 o'clock noon to file special pleas in this case.

And it is further ordered and adjudged by the court that the defendant's request to be tried together with the defendant in Cases No. CC 77 000532 and CC 77 000533, be and the same is hereby granted.

And thereupon in open court on this day the defendant waived challenge to Grand Jury over the objections of the defendant's attorneys.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

PSYCHIATRIC EXAMINATION FINDINGS

(State's Ex. 1 in state trial court — Habeas Answer Ex. A, 94-95, 251, 258)

Claude L. Brown, M.D.
176 Louiselle Street
Mobile, Alabama 36607

April 21, 1977

Judge Joseph M. Hocklander
Presiding Judge
Mobile County Circuit Court
Mobile County Courthouse
Mobile, Alabama 36602

Re: John Evans

Dear Judge Hocklander,

As you requested, I examined Mr. Evans in the Mobile City Jail on April 20, 1977. I explained to him the purpose of this examination; he already fully understood, was entirely agreeable to the interview, and talked freely about himself on all subjects.

He is of bright normal intellect, and has no history of any relevant diseases, injuries, or incapacitations. He says that he was entirely sober at the time of the crime. He consistently urges that he is responsible for his actions, and that, despite the attitudes of society, he has chosen crime as a way of life.

Mr. Evans is competent, rational, and able to stand trial. He understands thoroughly the nature and results of his actions; he knows the difference between right and wrong, and he chooses, often, the wrong.

He is sincere in seeking the death sentence, preferring extinction to a long prison sentence.

If a more detailed report is necessary, please let me know

Sincerely yours,

/s/Claude L. Brown, M.D.
CLAUDE L. BROWN, M.D.

CLB/lr

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT JURY EMPANELMENT PROCEEDINGS [Excerpts]

(Habeas Answer Ex. A, 85, 93-94)

(Bracketed page references are to Habeas Answer Ex. A pages)

[85]

THE COURT: I am not going to disqualify someone on the question of hesitation. Now, this case has received considerable pre-trial publicity. I know that most of you, or maybe some of you, have read or heard about the charges against these two defendants prior to today. The only Jurors that I can have sitting in the trial of this case are Jurors who can give me their assurance, individually, under oath, that they will not allow anything to influence their verdict in this case except the things they learn about the case in this Courtroom. You have to give me your assurance, under oath, that if you have read or heard anything about the case, you are capable of putting that out of your mind, and reaching a verdict on the evidence presented in this Courtroom. Does every Juror understand the question? Is there any Juror who doesn't understand clearly what I have said to you? I am now going to identify the Jury. Mrs. Trott will call your names. When your name is called, I want you to stand long enough for the attorneys to see who you are, than I want you to say, to me, "You have my assurance." Is that clear? Proceed.

* * *

[93]

THE COURT: Let the Record show that at the time the Court concluded asking its qualifying questions of the Jury, the Court requested that the attorneys contact the Defendant to see if [94] they had any additional questions, and Mr. Ritter indicated that he is satisfied. Is that correct?

MR. RITTER: That is correct, sir.

THE COURT: Mr. Pennington?

MR. PENNINGTON: Yes, sir?

THE COURT: Mr. Evans wanted some additional question asked, and I think I covered it, and Mr. Ritter and Mr. Evans are both satisfied with the Jury, is that correct?

MR. EVANS: Yes, sir.

MR. RITTER: Yes, sir.

MR. COLEMAN: Judge, may we put in the Record what the question was?

THE COURT: Mr. Evans wanted to be sure that no one had any hesitancy about returning a verdict of death by electrocution.

MR. COLEMAN: Yes, sir.

MR. EVANS: That's correct.

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

BEGINNING OF TRIAL [Excerpts]

(Habeas Answer Ex. A, 96-97)

(Bracketed page references are to Habeas Answer Ex. A pages)

(Title omitted in printing.)

* * *

[96]

MR. STEPHENS: Your Honor, for my client, I would like to ask for the Rule before we get started, if it hasn't already been requested.

MR. PENNINGTON: Mine, also.

MR. GRADDICK: And I would like to exclude Detective Bowman from the Rule.

THE COURT: All right. We will excuse Detective Bowman from the Rule, and any other witness may not be allowed to testify if he is in the Courtroom.

(Whereupon, the Rule having been invoked, all witnesses to the cause were instructed to remain outside of the Courtroom during all proceedings, except when called to testify.)

THE COURT: Proceed.

(Whereupon, an Opening Statement to the Jury was presented by Mr. Graddick, and there were no objections made thereto.)

(Whereupon, an Opening Statement to the Jury was presented by Mr. [97] Pennington, and there were no objections made thereto.)

(Whereupon, an Opening Statement to the Jury was presented by Mr. Coleman, and there were no objections made thereto.)

(Whereupon, Opening Statement was waived by Mr. Stephens.)

* * *

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(State's Ex. 22 in state trial court — Habeas Answer Ex. A, 207, 252, 285-286)

(Title omitted in printing.)

MOTION TO ENTER GUILTY PLEA

Comes now the Defendant in the above styled cause and represents unto the Court as follows:

1. My true name is John L. Evans and I am 27 years of age.

2. I completed the 12th grade in school and I can read and write.

3. I am represented by my attorney, Al Pennington & John Coleman, and he has discussed my case at length with me. I have had enough time to talk to him and I have discussed with him the facts in my case and I have discussed my Constitutional rights with him. I am satisfied with the services of my said attorney and I have no complaints as to the way he has handled my case.

4. I understand that the Indictment in this case charges me with the crime of Capital Murder (Act 213 Regular Session 1975 Alabama Legis) and my lawyer has explained to me the elements of this crime and the punishment therefor and I understand them.

5. I understand that the law applicable to such a charge provides that the punishment for that offense is imprisonment in the state penitentiary for not less than Death by Electrocution nor more than N/A. I wish to enter a Plea of Guilty to the offense of Capital Murder (Act 213 Regular Session 1975 Alabama Legis).

6. I understand that as to each offense charged against me in the indictment in this case I have a right to answer or plead (a) I am not guilty, (b) I am not guilty by reason of insanity, or (c) I am guilty as charged.

7. I further understand, and my lawyer has explained to me, that if I enter a plea of Not Guilty or Not Guilty by reason of insanity, to the charges, I have the following

constitutional rights:

(a) The right to be tried by a jury selected according to Law.

(b) The right to face all witnesses or accusers who testify against me and have them cross-examined by my attorney while they testify under oath.

(c) The right to have witnesses subpoenaed to give evidence in my favor and to testify myself or remain silent at my own choosing.

(d) The right to require the State of Alabama to prove my guilt beyond a reasonable doubt before I can be adjudged guilty.

(e) That I am presumed innocent of the offense charged until the State proves my guilt beyond a reasonable doubt.

(f) The right to challenge the composition of the Grand Jury which indicted me or the venire from which a petit jury will be selected to try me.

(g) The right to appeal a conviction.

(h) The right after conviction to ask for a pre-sentence investigation, a suspended sentence or the benefits of probation.

8. I further understand that if I advise the Court that I am Guilty and enter a Plea of Guilty, that I am surrendering all of the above rights (a) through (f).

9. I further understand that if I plead Guilty that the Court can sentence me to the same punishment as if I had been convicted by a Jury and further, that the Court may not give me probation even though I ask for it.

10. No one has threatened me or promised me any reward or inducement nor any hurt or harm to me or to anyone I am interested in to get me to plead guilty.

11. I wish to enter my Plea of Guilty because I am guilty and I believe it is in my best interest to enter such a plea.

12. I further understand that any agreement or recommendations that have been or may be made by the State of Alabama through the District Attorney do not bind the Court and may not be followed in imposing sentence or granting probation.

I now request that the Court allow me to enter a Plea of Guilty to the offense of Capital Murder Act 213 Regular Session of Alabama Legislature 1975 in this case.

/s/John L. Evans, III
(Defendant)

I have assisted my client in the completion of the foregoing and have satisfied myself that the Plea he wishes to enter is ~~in his best interest and therefore recommend it to him and voluntarily to the Court based on my professional judgment~~ voluntary and with full understanding of the consequences. Based on my professional judgment this was done knowingly after being advised fully of his rights. This is done over advice of counsel.

/s/Al Pennington
(Attorney for the Defendant)

(Initials "J.E." by each paragraph omitted in printing.)

(Exhibit stamp omitted in printing.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

EVANS' STATE TRIAL COURT TESTIMONY

(Habeas Answer Ex. A, 206-216)

(Bracketed page references are to Habeas Answer Ex. A pages)

[206]

(Whereupon, the Jury having been removed from the Courtroom, the following proceedings were had and done, in due form of law, outside the presence of the Jury:)

THE COURT: All right. We're not in recess, now. The State has rested, and Mr. Evans, for the last time, and Mr. Ritter, for the last time, your attorneys inform me that you wish to plead guilty to this offense and that you [207] wish to take the stand and testify. This is your decision. No one can tell you to do so. Do you have a written Guilty Plea in each case?

MR. STEPHENS: Judge, we would request again, before they take the stand, that all Constitutional rights be read to them, that they be fully aware of what they are doing. This is strictly against my advice and counsel, but they want to do it.

(Whereupon, State's Exhibit Number 21, being a Request to Enter Guilty Plea form, signed by Wayne E. Ritter, March 26, 1977, and State's Exhibit Number 22, being a request to Enter Guilty Plea form, signed by John L. Evans, March 26, 1977, were marked into evidence by the Reporter.)

* * *

[208]

THE COURT: All right, sir. Mr. Evans. Now, I have been handed a similar instrument marked

State's Exhibit 22, which appears to have been signed and initialed by you.

MR. EVANS: Yes, sir.

THE COURT: Did you sign it?

MR. EVANS: Yes, I did.

THE COURT: Did you place your initials by each paragraph?

MR. EVANS: Yes, I did.

THE COURT: Did you do so to represent that you have read and do understand each item in each paragraph?

MR. EVANS: Yes, sir.

THE COURT: Again I ask, did you read it or did Mr. Pennington read it or Mr. Coleman read it with you?

MR. EVANS: Yes.

THE COURT: Did either of them go over it with [209] you?

MR. EVANS: Yes, they have.

THE COURT: All right.

MR. PENNINGTON: I wanted to move to exclude the State's evidence, your Honor, on the basis that they haven't proved a prima facia case.

THE COURT: All right. I will deny your motion.

MR. COLEMAN: Judge, while we have the Jury out, it's my understanding on Mr. Evans, last I heard was he still intends on taking the stand. For the Record, I would like to point out to the Court that I have advised the Defendant against taking such a course of conduct in taking the stand. I have advised him of the consequences of his taking the stand, including that any deficiencies in the predicate being laid for the proper admission of the confession would be waived by his taking the stand, and admitting in Court his participation in this crime. He advises me that he wishes to do so, anyway, against my advice and consent.

THE COURT: It is his decision.

MR. COLEMAN: Yes, sir.

MR. PENNINGTON: I have made the same representation on more than one occasion.

* * *

[210]

MR. PENNINGTON: Your Honor, the Defendant has indicated that he wishes to take the stand. If he still does at this time, we would call him.

JOHN LOUIS EVANS, III

The Defendant, called on behalf of himself, having been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

MR. COLEMAN: Note my objections for the Record.

MR. PENNINGTON: Also note mine.

[211] MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I can think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say.

THE COURT: Any questions from the District Attorney?

CROSS EXAMINATION

BY MR. GRADDICK:

Q: Mr. Evans, has anybody ever threatened, coerced or forced you into this?

A: No, they have not. In any way.

[212] Q: Certainly, no one's offered you any hope of reward or leniency, have they?

A: Obviously not.

Q: When you came to Mobile, Alabama, you came here with the intent of robbing some place?
A: Yes, I did.
Q: Did you have a weapon on you?
A: Yes, I did.
Q: You were travelling with Mr. Ritter, here?
A: Yes, I was.
Q: Were you in a 1967 (sic) light blue Cutlass Supreme Oldsmobile?
A: No. A brand new one.
Q: Brand new?
A: Brand new.
Q: Rented in Indianapolis?
A: In Indianapolis. We ended up stealing the car.
Q: Stealing it?
A: Yes, I did.
Q: And, had a white license tag with blue numerals? Did it?
A: Well, more or less, yes.
Q: And, you came from Biloxi over here, right?
A: Yes, I did.
Q: How long did you drive around looking for a place to rob?
A: About --. A few hours. We wanted to wait pretty well until it was dark, and then we decided, well, while we were riding around that we were going to find a gun shop and get a pistol because we had a semi-automatic [213].22 rifle that we wanted to get rid of. It was just too cumbersome, too bulky to try and go pull armed robberies with. It was not very effective.
Q: You consider yourself a pro, do you not?
A: Yes, I do. During our spree, and this is something I don't know if you've been informed of or not, and I'm sure that Mr. Graddick ought to know, I don't know if he's allowed to bring it up or not, but, just in a two month period we were involved in about thirty armed robberies, and two extortions, and about nine kidnappings, so that gives you an idea, you know --.
Q: So this wasn't your first time, was it?
A: No, sir. Not by a long shot.

Q: How many had you committed prior to coming to Mobile, Alabama?
A: I --. Since leaving Indianapolis, or before?
Q: Before Indianapolis. You can tell me before, if you like.
A: About 250.
Q: 250 armed robberies?
A: Yes.
Q: Prior to Indianapolis?
A: Well, up until the time we got here. That's a pretty tight guess.
Q: I see. All of them with a weapon?
A: Oh, yes.
Q: Ever harmed anybody?
A: Yes.
Q: Was all of this with your side-kick, here, Mr. Ritter?
[214] A: Oh, no. No. We just started in Indianapolis Christmas Day, I think it was as a matter of fact, the day we left.
Q: And, how many did you hit --? How many places did you rob prior to getting to Mobile?
A: Three.
Q: Three?
A: Four.
Q: Four?
A: Yes.
Q: And, you got here and you decided you needed a gun, is that right?
A: That's right.
Q: You found a pawn shop out there and you rode around the corner like that little boy and little girl testified?
A: They testified right on the money.
Q: Right on the money?
A: That's right.
Q: And that lady who said that she identified y'all, she was on the money, too, is that right?
A: That's about right.
Q: Who went in first?
A: Well, when we got to the Pawn Shop, I think Wayne went in first, and I was right behind him.
Q: Mr. Evans, you weren't intending on leaving there

dead, were you?
A: No, sir, was not.
Q: If you had to take somebody's life, you would have done it, wouldn't you?
[215] A: Yes, sir.
Q: And if you get out of, walk out of here today, or any time in the future, and you go back to robbery, which you say you would, you would do the same thing, wouldn't you?
A: If I ever felt in peril, if it ever came down to a situation where it's going to be me or somebody else, I'm going to make damn sure it's not me.
Q: You made "damn sure" it wasn't you on that occasion, didn't you?
A: Yes, sir, I did.
Q: You shot him right in the back, is that right?
A: Yes, I did.
Q: You knew he was dead when you walked out of there, didn't you?
A: Oh, yes.

MR. GRADDICK: I don't have any other questions.
MR. COLEMAN: Judge, may I ask a question or two?

EXAMINATION

BY MR. COLEMAN:
Q: Mr. Evans, you took the stand against my hourly advice. did you not?
A: Yes, I did.
Q: And you are testifying now, against the advice of counsel, are you not?
A: Yes, I am.
Q: And you entered the guilty plea, and signed the waiver and plead guilty against our advice, did you not?
A: Yes, I did.
[216] Q: And during the entire period when we have been representing you, you have affirmatively instructed us not to do anything in your defense, is that correct?
That is correct.
MR. COLEMAN: Thank you.

THE COURT: Anyone else?

RECROSS EXAMINATION

BY MR. GRADDICK:

Q: You don't have any remorse from shooting Mr. Nassar, do you?

A: Not at all.

MR. PENNINGTON: Judge, may I ask him just one question?

EXAMINATION

BY MR. PENNINGTON:

Q: Mr. Evans, do you have a judgment as to how many times myself or Mr. Coleman has instructed you not to follow the course you followed?

A: Twenty or thirty times.

MR. PENNINGTON: No more questions.

(Witness excused from stand.)

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

(Habeas Answer Ex. A, 222-226)

(Bracketed page references are to Habeas Answer Ex. A pages)

[222]
MR. PENNINGTON: We rest, your Honor.

(Whereupon, a Closing Statement to the Jury was presented by Mr. Graddick, and there were no objections made thereto.)

(Whereupon, a Closing Statement to the Jury was presented by Mr. Pennington, and there were no objections made thereto.)

(Whereupon, Closting Statement to the Jury was waived by Mr. Coleman.)

(Whereupon, a Closing Statement to the Jury was presented by Mr. Stephens, and there were no objections made thereto.)

COURT'S ORAL CHARGE TO THE JURY

THE COURT: The rules of law that I discuss with you are rules of logic and common sense. If anything I tell you doesn't sound fair and reasonable and like good common sense, raise your hand and let me go into it further. Otherwise, I will assume you understand it and you agree with me that it is good common sense, because that's what law is all about. The first thing you must understand is that nothing I say or do throughout the trial is designed to suggest what I believe your verdict [223] should be. I am forbidden by law from expressing any opinion on the evidence. The Court has no opinion on the evidence; the

Court expresses no opinion on the facts. I can only tell you that in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further. You must reach a verdict that is supported by all of the creditable evidence that has been presented to you in this case. The charge against the Defendants is that they did unlawfully, intentionally, and with malice aforethought, kill Edward Nassar during the course of a robbery. The law of Alabama provides that anyone who, during the course of a robbery, intentionally kills the victim, is guilty of this offense, and the punishment for this offense is death by electrocution. You will have the indictment with you. It contains three counts. It simply explains in three different ways the charge against the Defendants. Now, the State must prove that they intentionally killed Mr. Nassar. Unless there is an actual or positive intent to kill, they are not guilty of the crime with which they are charged. The intentional killing is a willful killing, an act governed by the will of the individual committing the same. The indictment further [224] charges that they committed the act with malice. Malice means hatred or hostility toward another. It doesn't necessarily mean a personal ill will. When associated with Murder, or a killing of this kind, it means an unlawful act, willfully done, without just cause or legal excuse. It is that mental state or condition which prompts one to do an unlawful act without legal justification. It has also been defined as that condition of mind which shows a heart, regardless of social duty, fatally bent on mischief. There are only two possible verdicts that you can return. Each verdict must be a unanimous verdict. It must be each Juror's personal verdict. Each Juror must be prepared to say, if asked, this is my personal verdict. If you find the Defendant guilty, as he is charged, in each case, you will have to write a verdict on the back of the indictment. If you find him guilty, the form is: "We, the Jury, find the Defendant guilty as charged in the indictment, and fix his punishment at death by electrocution." If you find him not guilty, the form is: "We, the Jury, find him not guilty." A Defendant in Alabama is presumed to be innocent, and this

presumption of innocence attends him as a matter of evidence until the State has, by the evidence, proven him guilty beyond all [225] reasonable doubt. That is the burden that is on the State of Alabama. They must prove the Defendant guilty beyond all reasonable doubt. I did not say beyond every doubt, or beyond all possible doubt. I said beyond all reasonable doubt. A reasonable doubt is an actual and substantial doubt, as distinguished from a mere fanciful or imaginary doubt. It is a doubt for which some reason exists, and this reason can be found either in the evidence, or in the absence of evidence. Until and unless the State proves the Defendant guilty beyond a reasonable doubt, you cannot convict him. Does any member of the Jury have a question? Anything that I have overlooked from the State?

(Whereupon, there was a brief conference at the Bench.)

THE COURT: I will further charge you with regard to the law of accomplices, or of an accomplice. The law is that anyone who aids or abets in the commission of an offense must be indicted, tried, and punished as if he were the principal.

MR. GRADDICK: No other exceptions.

THE COURT: Anything that I have overlooked for the Defendant, Mr. Pennington? Mr. Coleman?

MR. PENNINGTON: No, sir, your Honor.

MR. COLEMAN: No, Sir.

THE COURT: Mr. Stephens?

[226] MR. STEPHENS: No, sir, Judge.

THE COURT: Lady and gentlemen, you may now retire.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT MINUTE ENTRY CONCERNING CONVICTION

(Habeas Answer Ex. A, 29)

(Title omitted in printing.)

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorneys, John Coleman and Al Pennington, and the defendant having heretofore on the 18th day of April, 1977, been arraigned on the Indictment in this case charging him with the offense of Capital Murder and plead guilty, and the trial of this case having been regularly set for this day, thereupon in open court on this day in the presence of the District Attorney, defendant's attorneys and defendant came a jury of good and lawful men and women to-wit: Bobby Allen Lavinsky, Davis Allen Arthur, Lawrence Evans Watson, James Walter Trammell, Harry Daniel Fowler, Winfred Earl Corn, Sr., Betty Tanner Brunson, Thomas James Bryant, Thomas Earl Burdette, William A. Hamilton, Jr., Garland Cecil Hamilton and James T. McClinton, who being duly empaneled and sworn according to law, who having heard the evidence and the charge of the Court upon their oaths in open court on this day in the presence of the District Attorney, Defendant's attorneys and defendant do say, "We, the Jury, find the defendant guilty as charged in the indictment and fix his punishment at death by electrocution."

And it is ordered and adjudged by the Court that this case be and the same is hereby re-set for sentence on the 27th day of April, 1977, at 9:30 A.M.

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE TRIAL COURT
SENTENCE HEARING [Excerpts]

(Habeas Answer Ex. A, 235-236)

(Bracketed page references are to Habeas Answer Ex. A pages)

[235]

THE COURT: Does the Defendant, Mr. Evans, care to offer evidence in litigation?

MR. COLEMAN: Judge, I would like to point at those earlier records and make sure that there's no question about it inasmuch as there is an automatic appeal that we have not waived the issue of the constitutionality of the statute under which we are proceeding.

THE COURT: Alright.

* * *

[236]

THE COURT: Mr. Evans, have you been satisfied with the representation you received in the case?

MR. EVANS: Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 1-6]

(Title omitted in printing.)

(Stamp indicating filing date of April 12, 1979, omitted in printing.)

PETITION FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
AND FOR STAY OF EXECUTION

[Excerpts]

To a District Judge of the United States District Court for the Southern District of Alabama:

* * *

4. The nature of the offense involved is that petitioner was charged with capital murder in violation of § 13-11-2(a)(2), Code of Alabama (1975) in that he allegedly killed Edward A. Nassar with malice aforethought in the course of a robbery.

5. Petitioner's plea at arraignment was guilty, a plea not accepted by the court.

6. Trial of the issue of guilt or innocence was before a jury. The jury mandatorily imposed a death sentence on him. Subsequent to the jury verdict, the trial court held a hearing to determine whether or not the jury verdict should stand. After conducting the hearing, the trial judge declined to commute the death sentence.

7. Petitioner testified at trial, admitted guilt and asked that he be executed.

8. Petitioner's conviction and death sentence were appealed without his consent under the provisions of the Alabama Automatic Appeal Statute, § 12-22-24, Code of Alabama (1975).

* * *

12. Petitioner's conviction and sentence were obtained in violation of his rights as guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States for each of the reasons set forth more fully below.

(a) Petitioner was indicted, tried, convicted and sentenced under the provisions of § 13-11-1 et seq., Code of Alabama (1975), the Alabama death penalty statute. The Alabama death penalty statute is a post-*Furman v. Georgia*, 408 U.S. 238 (1972), pre-*Gregg v. Georgia*, 428 U.S. 153 (1976) law which has the following features:

(1) Lesser included offenses, although supported by the evidence, cannot be submitted to the jury in a capital prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether.

(2) The jury is required automatically to "fix the punishment at death" whenever it convicts the defendant of the capital crime charged.

(3) The defendant's only outlet from this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict hearing and "after weighing the aggravating and mitigating circumstances" as well as "the fixing of the punishment at death by the jury."

(4) The jury has no voice in the process of determining the propriety of the death sentence upon the facts of the particular case, other than to fix the mandatory death

sentence which the judge must reduce in order to spare the defendant's life.

(5) In deciding whether to reduce or to accept the mandatory jury-fixed sentence, the judge may consider in mitigation of that sentence only seven statutorily enumerated "mitigating circumstances," and may not give independent consideration to other mitigating evidence.

The net result of the features enumerated above is a capital punishment sentencing scheme which is inherently unreliable. Sentencing under that scheme has violated the petitioner's eighth and fourteenth amendment rights.

(b) In cases tried under the Alabama death penalty statute, trial juries are prohibited from considering evidentially supported lesser included offenses. That prohibition violates the defendant's right to due process of law as guaranteed by the fourteenth amendment.

(c) Petitioner was charged by indictment with unlawfully, intentionally and with malice aforethought killing Edward Nassar while "engaged in the commission or an attempt to commit a robbery." (R.20.) The indictment clearly charges the capital offense of robbery-murder. At trial, however, the judge failed to charge on the elements of robbery. (R. 223-225.) The trial judge's failure to instruct the jury on the elements of robbery deprived petitioner of due process of law as guaranteed by the fourteenth amendment.

13. The constitutional claims set forth in paragraph 12 above have been previously presented to the Alabama courts and been rejected.

* * *

Wherefore, Petitioner prays that this Court:

1. Issue a writ of habeas corpus to have him brought before it to the end that he may be discharged from his

unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Stay petitioner's execution pending final disposition of this petition; and

3. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/Dennis N. Balske
DENNIS N. BALSKE
STEPHEN J. ELLMANN
MORRIS S. DEES
JOHN L. CARROLL
1001 South Hull Street
Montgomery, AL 36104

ATTORNEYS FOR
PETITIONER

(Verification and certificate of service omitted in printing.)

IN THE
UNITED STATES DISTRICT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 16-39]

(Title omitted in printing.)

(Stamp indicating filing date of April 19, 1979 omitted in printing.)

MOTION FOR ORDER COMPELLING PETITIONER TO PRESENT ALL CONSTITUTIONAL CLAIMS AND ISSUES OR WAIVE THEM

Respondents move the Court to enter an order placing petitioner and his attorneys on notice that any claims and issues not raised before submission of the present petition to the Court will be deemed waived and will be barred from consideration in any future proceeding. As grounds for this motion, respondents show the following:

1. Any and all possible federal constitutional issues and claims concerning petitioner's conviction and sentence should be presented in the present proceeding so that the entire matter can be determined in an efficient and expeditious manner.

2. Unless petitioner and his attorneys are put on notice that any issue or claim not raised in the present proceeding will be deemed waived and will be barred from consideration at any later time, petitioner and his attorneys may attempt to reserve some claims or issues for presentation in a future proceeding. Such fragmentary and piecemeal presentation of issues and claims could be used as a device to seek or ensure further delay of petitioner's execution, if and when all the issues and claims presently raised in the pending petition are decided against petitioner.

3. Two of the four attorneys presently representing peti-

tioner recently raised in a proceeding in which they were representing another death row inmate some federal constitutional claims and issues which they did not raise in the petition filed in the present case. That other proceeding was a petition for writ of error coram nobis filed in the Circuit Court of Blount County, Alabama, in a case styled *Jerry Wayne Jacobs v. State of Alabama*. The petition filed in that case is contained on pages 2-13 of the copy of the appellate record in that case which is attached to this motion as Exhibit A.

4. Respondents do not admit or mean to to imply that there are any additional claims or issues which are in any way bona fide or even open to credible argument. It is respondents' position that the additional issues and claims raised in the petition which is part of Exhibit A are groundless and even frivolous. Those additional issues raised in the petition which is part of Exhibit A are referred to in this motion solely to illustrate that petitioner and his attorneys may be seeking to reserve some issues, which they believe to be non-frivolous, for use as a basis for future proceedings and further delay.

5. Respondents do not admit that any of the allegations, including the factual allegations, contained in the petition which is part of Exhibit A are true.

6. An order placing petitioner and his attorneys on formal notice that the marshalling of claims and issues for fragmentary and piecemeal presentation will not be allowed by the Court will prevent any misunderstanding on this point.

Therefore, respondents respectfully ask this Court to enter an order placing petitioner and his attorneys on notice that any and all federal constitutional claims and issues must be raised in the present proceeding or they will be barred from presentation in the future.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY
GENERAL
BY-

/s/Ed Carnes
ED CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

(Address of counsel and certificate of service omitted in printing.)

(Exhibit A to this motion, which is contained on pp. 20-39 of the record on appeal, omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

[R. 44-49]

(Title omitted in printing.)

ORDER

[Excerpts]

* * *

. . . this Court hereby directs that counsel for the petitioner has five days from date of this order in which to amend its petition to aver each and every ground that they can conceivably think of that can be asserted under the conditions prevailing in this factual situation that is within the law on which to attack the constitutionality of the Alabama death statute or the incarceration of John Louis Evans, III. If counsel for Evans declines to follow the orders and directions of this Court in this regard then, by such declination, they will thereby be presumed to have deliberately waived the rights to any such proceedings on any such actions in the future. This Court and the judicial processes will not be so used to thwart the will of the people, but the doors of this Court are now open to Mr. Evans to do whatever he can through the agencies of his selected counsel whom this Court finds fully competent in these particulars to exhaust his remedies on the constitutional questions and any other questions that have viable merit under the law.

With respect to the stay of execution requested by the petitioner, the Court is of the opinion that such a stay is due to be GRANTED so that the petitioner can fully litigate his rights. Accordingly, the execution presently set for April 27, 1979 is STAYED, with such stay being effective at 5:00 p.m. on Thursday, April 26, 1979, PROVIDED that this action is not withdrawn by the petitioner by appropriate

pleading prior to this time, in which event this stay would be void and of no effect.

DONE this 20th day of April, 1979.

/s/W. B. Hand
UNITED STATES
DISTRICT JUDGE

U. S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE
20th DAY OF APRIL, 1979
MINUTE ENTRY NO. 48,967
WILLIAM J. O'CONNOR, CLERK
BY: /s/G. Walter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

[R. 52-53]

(Title omitted in printing.)

(Stamp indicating filing date of April 25, 1979, omitted in printing.)

AMENDED PETITION

[Excerpts]

Comes now the petitioner in the above-styled cause and amends his petition.

* * *

2. By adding the following subparagraph to paragraph 12

(d) In cases tried under the Alabama death penalty law, juries are prohibited from considering evidentially supported lesser included offenses. That prohibition violates petitioner's right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the constitution of the United States.

* * *

Respectfully submitted,

/s/John L. Carroll
JOHN L. CARROLL
DENNIS N. BALSKE
MORRIS S. DEES
STEPHEN J. ELLMANN
1001 South Hull Street
Montgomery, AL 36104

ATTORNEYS FOR
PETITIONER

(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

[R. 58-66]

(Title omitted in printing.)

(Stamp indicating filing date of May 14, 1979, omitted in printing.)

ANSWER

[Excerpts]

In response to the amended petition filed in this case, respondents answer as follows:

* * *

Proceedings in the State Courts

3. At each stage of the proceedings which led to petitioner's conviction and sentence, he voluntarily confessed his guilt after having been fully advised of his rights. Petitioner voluntarily confessed his guilt to investigators (Ex. A, 170-174, 275-278), to the grand jury (Ex. A, 318-337), at arraignment (Ex. A, 68), and at trial (Ex. A, 210-216).

4. On April 8, 1977, the Mobile County Grand Jury indicted petitioner for the capital offense of violating *Code of Alabama 1975*, §13-11-2(a)(2), by murdering Edward A. Nassar during the course of robbing him. (Ex. A, 1)

5. On April 18, 1977, petitioner was arraigned and pleaded guilty. (Ex. A, 6, 62-71) This plea was voluntarily entered by petitioner after he had been fully advised pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969), of all of his constitutional rights. (Ex. A, 48-54)

6. The trial court did not enter judgment at arraignment

based upon petitioner's guilty plea. Instead, petitioner was tried before a jury on April 26, 1977, and the State of Alabama proved beyond a reasonable doubt all of the elements of the capital offense with which petitioner was charged. (Ex. A, 72-228)

7. During the trial of petitioner in Mobile County Circuit Court, on April 26, 1977, after the State of Alabama had presented its case against petitioner, petitioner voluntarily submitted to the trial court a written instrument in which he asked to be allowed to plead guilty. (Ex. A, 206-216, 285-286) This instrument acknowledged and waived all of his constitutional rights not to plead guilty. (Ex. A, 285-286)

8. Immediately after the events described in the preceding paragraph, against the advice of his attorneys petitioner voluntarily testified as a witness against himself. (Ex. A, 206-216) During his testimony, petitioner admitted his guilt, and he asked to be convicted, sentenced to death, and electrocuted. (Ex. A, 210-216)

9. Petitioner was convicted by a Mobile County Circuit Court jury in Mobile, Alabama, on April 26, 1977 for the capital offense of violating *Code of Alabama 1975*, §13-11-2(a)(2), by murdering Edward A. Nassar during the course of robbing him. (Ex. A, 1, 29, 227)

10. While the verdict form with which the jury convicted petitioner "fixed" his punishment at death pursuant to *Code of Alabama 1975*, §13-11-2(a) (Ex. A, 227), the jury did not determine petitioner's sentence. Petitioner's sentence was determined pursuant to *Code of Alabama 1975*, §13-11-3 and §13-11-4 by the trial court judge.

11. On April 27, 1977, the Mobile County Circuit Court, per the Honorable Joseph M. Hocklander, Circuit Judge, conducted a sentence hearing pursuant to *Code of Alabama 1975*, §13-11-3.

12. Following the sentence hearing referred to in the

preceding paragraph, the Court entered specific findings of fact concerning the aggravating and mitigating circumstances in petitioner's case. (Ex. A, 238-241)

13. In the sentence hearing and determination, the Court found to exist and considered certain aggravating circumstances which are listed in *Code of Alabama 1975*, §13-11-6. (Ex. A, 238-240) The Court found that none of the mitigating circumstances which are listed in *Code of Alabama 1975*, §13-11-7 existed in petitioner's case. (Ex. A, 240-241) During the sentence hearing and determination of the Court did find and consider a non-statutory mitigating circumstance, one which is not listed in *Code of Alabama 1975*, §13-11-7. (Ex. A, 241)

14. After considering and weighing all of the aggravating and mitigating circumstances which it found to exist, the Court determined that petitioner's sentence should be death and it pronounced that sentence upon petitioner. (Ex. A, 241-243)

* * *

Exhaustion of State Remedies

16. Petitioner has exhausted all of his state remedies concerning any and all the claims, issues, and arguments which he has presented or which he can present concerning the validity of his conviction and sentence and concerning the constitutionality of the Alabama Death Penalty Statute.

17. The claims presented in paragraphs 12(a)(1) through 12(a)(7) and in paragraphs 12(b) and 12(c) of the amended petition have been presented to the Alabama courts by petitioner and they have been rejected.

18. The claims presented in paragraphs 12(a)(8) and 12(a)(9) and in paragraph 12(d) of the amended petition

have not been presented by petitioner to the Alabama courts. However, petitioner has no direct appeals remaining in the Alabama courts and well-established Alabama law concerning collateral review of convictions and sentences bars any consideration of these issues if presented by petitioner to Alabama courts. Any attempt by petitioner to present these issues to Alabama courts would be utterly futile and would merely cause further delay.

19. Petitioner has no more direct appeals available in the Alabama courts and well established Alabama law concerning collateral review of convictions and sentences bars further consideration by the Alabama court of any claims or issues whatsoever by appellant. Any attempt by petitioner to present any claims or issues whatsoever to the Alabama courts would be utterly futile and would merely cause further delay.

20. Respondents and the State of Alabama hereby expressly waive any defense based upon exhaustion of state remedies which respondents might even arguably be entitled to assert.

Response to Petitioner's Claims

21. In the trial of an indictment under Alabama's capital punishment statute, *Code of Alabama 1975*, §13-11-1 through §13-11-9, a jury has three alternatives. The jury can convict the defendant of the capital offense charged in the indictment, the jury can acquit the defendant of the capital offense charged in the indictment, or the jury can fail to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death in which case a mistrial results.

22. If a jury in a capital case does not feel that a sentence of death is proper in that case, the jury can acquit the defendant or it can refuse to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. If the jury

fails to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death a mistrial results. Pursuant to *Code of Alabama 1975*, §13-11-2(c), after a mistrial the defendant can be reindicted and tried for a non-capital offense.

23. While the verdict form with which the jury convicts any defendant of a capital offense must pursuant to *Code of Alabama 1975*, §13-11-2(a) "fix" the punishment at death, the jury does not determine or set the sentence of a defendant convicted of a capital offense under the statute.

24. Pursuant to *Code of Alabama 1975*, §13-11-3 and §13-11-4, the trial court judge and not the jury determines whether a convicted defendant in a capital case will receive a death sentence or a sentence of life without parole.

25. The trial court's determination of the sentence in a capital case is in no way restricted by the requirement that a jury which convicts a defendant in a capital case must return a verdict form fixing the punishment of that defendant at death.

26. Pursuant to *Code of Alabama 1975*, §13-11-3, the trial court's determination of the sentence of a defendant convicted of a capital offense is made only after a sentence hearing is held in which the court considers aggravating and mitigating circumstances.

27. In deciding whether to sentence a defendant convicted of a capital offense to death or to life without parole, a trial court judge is not restricted to consideration of only those mitigating circumstances which are listed in *Code of Alabama 1975*, §13-11-7. A trial court judge may consider non-statutory mitigating circumstances. As was stated in paragraph number 13 of this Answer above, the trial court judge who sentenced petitioner specifically listed in the sentence findings and considered in determining the sentence a non-statutory mitigating circumstance.

28. Alabama's appellate review of death sentences is not inadequate. The Alabama Death Penalty Statute, as interpreted by Alabama appellate courts, does provide for comparative appellate review of death sentences. Either the Alabama Court of Criminal Appeals or the Alabama Supreme Court may reduce a sentence of death to a sentence of life without parole.

29. The sentencing procedure used in capital cases in Alabama is not arbitrary and capricious as applied and administered.

30. Alabama's Death Penalty Statute, §13-11-1 through §13-11-9, is not a mandatory death penalty statute. The trial court judge who determines the sentence may set the sentence of a defendant convicted of a capital offense at either death or life without parole. In addition, the Alabama Court of Criminal Appeals and the Alabama Supreme Court may reduce a sentence of death to a sentence of life without parole.

31. Alabama's Death Penalty Statute as applied and administered is not mandatory. There have been numerous instances in which defendants convicted of a capital offense under the statute have been sentenced to life without parole.

32. Alabama's Death Penalty Statute and the practice thereunder does provide standards for determining burden of proof and/or persuasion in death penalty cases.

33. Alabama's Death Penalty Statute and the practice thereunder is not standardless, arbitrary, or otherwise defective.

34. The trial court's oral charge under the facts and circumstances of petitioner's case was not deficient, and it did not deprive petitioner of due process of law.

35. Petitioner, through his counsel, expressed satisfaction with the oral charge which was given at his

trial and did not object to it. In effect at the time of petitioner's trial was a contemporaneous objection rule, and petitioner's failure to object to the oral charge bars review of it.

36. Petitioner's failure to object to the oral charge at trial and petitioner's failure to make a showing of cause and prejudice bars federal habeas corpus review of the issue.

37. Petitioner's conviction and sentence were not obtained in violation of his rights guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution.

38. While petitioner was tried before a jury and while his guilt was proven in that jury trial beyond a reasonable doubt, petitioner did plead guilty at arraignment and at trial. (Ex. A, 6, 48-54, 62-71, 206-216, 285-286) Because petitioner pleaded guilty, review of his conviction and sentence in this proceeding is limited.

39. All claims and averments in the amended petition which are not specifically admitted herein are hereby expressly denied.

* * *

42. Exhibit A, the two-volume record of the proceedings in the Circuit Court of Mobile County, Alabama, is hereby expressly incorporated as part of this Answer.

Action Requested

Wherefore, respondents ask this Court to:

(A) Dismiss the amended petition with prejudice; or

(B) Dismiss a judgment in favor of respondents based upon the pleadings; or

(C) Enter summary judgment in favor of respondents.

Respectfully submitted,

/s/Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL

/s/Ed Carnes
ED CARNES
ASSISTANT ATTORNEY
GENERAL

ATTORNEYS FOR
RESPONDENTS

(Address of counsel and certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN LOUIS EVANS, III, Petitioner,	)	
vs.	)	CIVIL ACTION
ROBERT G. BRITTON, et al., Defendants.	)	NO. 79-0200-H

JUDGMENT

This matter came on for trial before the Court, Honorable W. B. Hand, District Judge, presiding, and the issues having been duly tried, in accordance with the Memorandum Opinion entered herewith, it is,

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus be and the same is hereby DENIED, with all costs of action taxed against the petitioner.

It is further ORDERED that the stay of execution heretofore entered by this Court on April 20, 1979, effective since April 26, 1979, is hereby DISSOLVED.

DONE this 12th day of June, 1979.

/s/W. B. Hand
UNITED STATES
DISTRICT JUDGE

U. S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED ON THIS THE
12th DAY OF JUNE, 1979
MINUTE ENTRY NO. 49,312
WILLIAM J. O'CONNOR, CLERK
BY: /s/G. Walter
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title omitted in printing.)

(Stamp indicating filing date of July 1, 1980, omitted in printing.)

APPELLEES' MOTION TO CERTIFY QUESTIONS OF ALABAMA LAW TO THE ALABAMA SUPREME COURT

Appellees in the above-styled cause move this Honorable Court to certify to the Alabama Supreme Court state law questions which will avoid in whole or part the federal constitutional issues involved in this appeal or at least substantially modify the nature of the federal constitutional issues. Further specification and grounds for this motion are as follows:

1. The Alabama law questions which should be certified to the Alabama Supreme Court are these questions (hereafter referred to as "the specified state law questions"), or these questions in substance:

a. Is the preclusion clause which was ruled unconstitutional by the United States Supreme Court in *Beck v. Alabama*, No. 78-6621 (U.S. June 20, 1980), severable from the remainder of the Alabama Capital Punishment Statute?

b. In view of the decision in *Beck v. Alabama, supra*, is any other part of the Alabama Capital Punishment Statute due to be struck and severed from the remainder of the statute?

c. In view of the evidence at his trial would Appellant Evans have been entitled, as a matter of state law, to have the jury instructed on any lesser included non-capital offense had it not been for the existence of the preclusion

clause which was struck down in *Beck v. Alabama, supra?*

d. When he was arrested, before the grand jury, and at his trial, Evans repeatedly confessed his guilt of the capital offense for which he was convicted. He entered a guilty plea at arraignment and signed a written "Motion to Enter Guilty Plea" at his trial. At all stages of the prosecution, Evans asked that he be convicted and sentenced to death. What effect does that course of conduct have as a matter of state law — what rights and claims of error, if any, did Evans waive under state law?

e. In view of *Beck v. Alabama, supra,* is Evans now entitled, as a matter of state law, to have his conviction or sentence reversed?

f. Under the Alabama Capital Punishment Statute, what is the burden of proof to be applied by the trial court judge to disputed factual issues, if any, at the sentence hearing?

g. Evans was convicted of the *Code of Alabama* 1975, § 13-11-2(a)(2) offense of robbery-intentional killing, and one of the aggravating circumstances that the trial court judge found and considered at the sentence hearing was the § 13-11-6(4) circumstances that the capital felony involved robbery. Was this finding a correct interpretation and application of the statute?

2. There are no clear controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions.

3. The resolution of the specified state law questions by the Alabama Supreme Court will avoid in whole or in part the federal constitutional issues involved in this appeal or will at least substantially modify the nature of the federal constitutional issues.

4. Until the specified state law questions are authoritatively determined by the Alabama Supreme Court, it is impossible to define precisely the federal constitutional issues presented in this appeal.

5. The proper, authoritative, and correct resolution of the specified state law questions vitally affects public policy of the State of Alabama and is a matter of great importance to numerous defendants and to all of the people of Alabama.

6. It is essential that the state and federal courts speak with one voice as to the specified state law questions, and the authoritative and final voice on Alabama law is the Alabama Supreme Court.

7. Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. Alabama Constitution, Article VI §140(b)(3), as amended by Amendment No. 328; Alabama Rule of Appellate Procedure 18.

WHEREFORE, Appellees respectfully request this Court to certify the specified state law questions to the Alabama Supreme Court, or in the alternative, to order the parties to submit to this Court a proposed agreed statement of facts and certificates of state law questions to be transmitted to the Alabama Supreme Court.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General
By-

/s/Ed Carnes
ED CARNES
Assistant Alabama
Attorney General

COUNSEL FOR
APPELLEES

(Certificate of service omitted in printing.)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2674

D. C. Docket No. CA-79-0200-H

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner,
Alabama Board of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Respondent-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

Before VANCE and SAM D. JOHNSON, Circuit Judge,
and THOMAS,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

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*United States District Judge for the Southern District of Alabama, sitting by designation.

the said District Court in this cause be, and the same is hereby, reversed:

It is further ordered that respondents-appellees pay the costs on appeal to be taxed by the Clerk of this court.

October 15, 1980

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

Issued as Mandate:

(A copy of the court's March 9, 1981 opinion was attached to the judgment. That opinion, which is reproduced at pp. 3a-14a of the appendix to the certiorari petition, is not reproduced here.)

SUPREME COURT OF THE UNITED STATES

No. 80-1714

Robert G. Britton, Commissioner, Alabama Department of Corrections and Joseph Oliver, Warden,

Petitioners

v.

John Louis Evans, III

Respondent

ORDER ALLOWING CERTIORARI. Filed June 22, 1981.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.